IN THE

Supreme Court of the United States.

OCTOBER TERM—1924, No. 362.

SECOND RUSSIAN INSURANCE COMPANY,
Complainant-Appellant,

—against—

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNEST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER and CARL CHRISTIAN STAHL, individually and as co-partners, doing business under the firm name and style of "H. Mutzenbecher, Jr.,"
Defendants-Appellees.

APPELLANT'S BRIEF.

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SUBJECT INDEX.

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Nature of the Appeal.

This is an appeal from a decree of the Circuit Court of Appeals (Second Circuit, 297 Fed. 404), affirming a final decree of the District Court (Southern District of New York; see Opinion, fol. 2719), dismissing the bill, after a trial, upon the merits (fol. 2755).

Statement of Facts.

The action was in equity under Section 9 of the Trading With the Enemy Act (Comp. Stat.

Anno. Supp. 1919, Sec. 3115½e), to recover certain moneys, seized by the *defendant* Alien Property Custodian from the deposit account of appellant with the *defendant* New York Life Insurance & Trust Company and now held by the *defendant* Treasurer of the United States.

The seizure was made January 13th, 1919 (fol. 26), upon the claim of the Custodian that plaintiff owed an amount equal to the sum seized to the *defendants* Behre, Mutzenbechers and Stahl, a German co-partnership [one of whose members, Behre, was a subject of Russia (fol. 2585) and an alien enemy in Germany (fol. 2700)], known and hereinafter referred to as Mutzenbecher, Jr., then alien enemies, residing and doing business as reinsurance agents at Hamburg, Germany, and not holding a license granted by the President. The moneys deposited with the Trust Company in the statutory trust fund are by the New York statute for the protection of United States policyholders and creditors of plaintiff (fols. 16, 27, 28, 29, 30).

Second Russian Insurance Company (hereinafter called the reinsurance company) was incorporated in 1835, its charter and by-laws being a statute of the Czar of Russia (fol. 4).

The reinsurance company established a "United States branch" in New York in 1913, pursuant to Section 27 of the Insurance Law of the State (see addendum A to this brief), for the purpose of conducting a reinsurance business (fol. 6). It complied with the statutes of New York, executed a trust deed in favor of and deposited with the New York Life Insurance & Trust Company, as statutory trustee (see addendum A), under the trust deed, $200,000 in currency and securities,

which it has increased from time to time (fols. 6, 12, 13, 2758).

Pursuant to the State Insurance Law, the reinsurance company, upon establishing the United States branch, appointed Meinel & Wemple, Inc., a New York corporation, as its United States manager and attorney-in-fact (fol. 147). The New York business of the reinsurance company was subject to a general agency contract between it and Mutzenbecher, Jr., for all countries throughout the world, except Russia, and including the United States and Germany.

Mutzenbecher, Jr., was a nominal stockholder for a small part of the total capital stock of $10,000 of the New York corporation Meinel & Wemple, Inc., but by agreement their stock did not enable them to participate in profits of Meinel & Wemple, Inc., for under the original plan of organization of this corporation, in 1913, the entire profits were payable as salaries to the three domestic stockholders, officers and directors, Messrs. Meinel, Wemple and Wilcox, who had theretofore been engaged as a New York co-partnership under the firm name of Albert Wilcox & Co in representing foreign reinsurance companies in New York (fol. 2826, Defts'. Ex. B, fol. 2821).

Mutzenbecher, Jr., was entitled, under the contract with the reinsurance company, by its terms continuing until the year 1925, to a commission of 3½% of gross premiums on all business done by the reinsurance company in the allotted countries, including the United States. Meinel & Wemple, Inc., as United States Manager and Attorney-in-Fact, agreed to receive for their services ⅜ of 1% of the gross premiums on American

business, plus their agency expenses, to be deducted from the general agents' 3½%.

Upon the establishment of the United States branch, treaties were entered into between the reinsurance company and direct-writing companies in the United States. The treaty companies reported to Meinel & Wemple, Inc., the United States Manager, upon bordereaux, showing the name of the insured, amount of the cession, the premium rate and location of the property. Meinel & Wemple, Inc., kept the accounts in New York, collected the premiums from the ceding companies, made the deposits with the trustee, pursuant to the New York statute, *i. e.*, the required reserved portion of the unearned premiums and transmitted the balance with bordereaux to the general agents at Hamburg.

The general agents, Mutzenbecher, Jr., had formed a pool for various companies represented by them at Hamburg, including the Second Russian, the members of which retroceded or reinsured with each other. So far as appellant's business was concerned, the duties of the general agents were to supervise the accounts of the sub-agents and attend to the retroceding for the Second Russian with the other members of the pool. For this purpose, they mapped and carded the business of the Second Russian and the other pool members at Hamburg, that is, made a continuing record of all insurances of the several companies represented by them, to be used to avoid overloading any one company in a particular location. These records were of cumulative value as the policies were for terms of from three to five years.

Upon the establishment of the British blockade in 1914, communication with Germany from the west became impossible. The blockade did not, however, extend to the north. The Mutzenbechers had relatives (fols. 2644, 2648), Thomas Clausen and Paul Clausen, at Copenhagen, Denmark (not Holland, as stated by the Court of Appeals) and commencing October 20th, 1914, up to October, 1916, Meinel & Wemple, Inc., at the request of Mutzenbecher, Jr., communicated with the German agents (Ex. H, fols. 2866-2870), through the Clausens at Copenhagen, as a mail-box (fol. 2656) by which means the necessary bordereaux and data were furnished to Mutzenbecher, Jr. (fols. 205-209). No bordereaux were furnished after October, 1916, and Mutzenbecher, Jr., thereafter could not keep up its work (fol. 2692). Clausen was not employed by appellant (fols. 759, 803, 783, 788, 797, 755). The United States manager was instructed by appellant to send no papers to Clausen (fols. 752; 864-865).

Stahl, one of the Mutzenbecher partners, testified that appellant knew nothing of the functions of Clausen in Copenhagen (fols. 2464, 2659).

The Russian Government on October 29th, 1916, promulgated a trading with the enemy law declaring contracts between Russian nationals and German nationals cancelled and commercial intercourse prohibited (fol. 2392). (For the convenience of the Court, we attach as Addendum B to this brief an English translation of the Russian decree taken from appellees' brief in the Court of Appeals.) Notice of this statute and of cancellation of the contract was given Mutzenbecher, Jr., as required by the Russian statute, service

being made through the Spanish Embassy (fols. 597, 2680).

Following the notice of cancellation of the Mutzenbecher, Jr., contract the reinsurance company appointed the New York corporation, Meinel & Wemple, Inc., theretofore sub-agents, general agents in New York and the business of the United States branch of the reinsurance company, under the existing treaties between direct writing companies and the reinsurance company, was thereafter continued by the reinsurance company and the corporation Meinel & Wemple, Inc., in disregard of Mutzenbecher's general agency contract (fol. 175).

At the date of the passage of the Russian Trading With the Enemy Act of October 29th, 1916, the United States was a neutral; but before the seizure (January 13th, 1919), and on April 6, 1917, entered the war allied with Russia, and Germany became a common enemy. Our Trading With the Enemy Act became a law October 6th, 1917 (40 Stat. 419; Comp. St. Anno. Supp., Sec. 3115½).

The theory of the seizure was that regardless of the effect of the Russian statute *in Russia and/or Germany* on the general agency contract between the reinsurance company and Mutzenbecher, it was wholly ineffective elsewhere; that Mutzenbecher, Jr., continued to be entitled to the general agency commissions on business done by the reinsurance company in New York between October 29th, 1916, and the date of seizure, less the commissions of the sub-agent Meinel & Wemple, Inc., to wit, $15,801.31, the sum seized from the Trust Company, the statutory trustee.

It is not disputed that all commissions accru-

ing prior to the date of the Russian ukase of October 29th, 1916, were fully paid to Mutzenbecher (fols. 268-271).

The Relations Between the Reinsurance Company and Mutzenbecher, Jr., Prior to 1916.

At the outbreak of the war in August, 1914, the reinsurance company domiciled in Russia and H. Mutzenbecher, Jr., domiciled in Germany became alien enemies. Thereafter the company handled all matters directly with the United States manager, having no communication whatever with Mutzenbecher, Jr. (fol. 749). The reinsurance company informed the Russian Insurance Department fully of its relations with Mutzenbecher, Jr. (fol. 746) and was told that the carrying out of the agreement as to the American business would not be considered an evasion of the then existing Russian laws relating to trading with the enemy (fols. 746-747). The Russian Government consistently maintained this attitude until October 29th, 1916 (see testimony of Mr. G. D. Talbot (fol. 477) and Mr. Nicolai Belotsvetov (fols. 1307-9)).

Until the ukase of October, 1916, the Russian Government permitted otherwise obligatory payments to Germans out of funds held abroad at the disposal of Russians (fol. 1308). There was no change in the relations of the reinsurance company and Mutzenbecher, Jr., so far as the business of the United States branch was concerned, save that remittances were made direct from Meinel & Wemple to the insurance company and commissions to Mutzenbecher, Jr. (fol. 749), until the ukase of October 29th, 1916, which, according to

the testimony of the Russian law expert, Romuald R. Sendzikowsky, had the legal effect of cancelling all contracts between Russian subjects and subjects of the German Empire (fol. 2393) wherever executed (fol. 2417) and prohibited all payments by Russians to Germans, even from money held in neutral territory (fol. 2413), all without the power of modification or exception on the part of the Russian Government (fol. 2430).

Subsequent to October 29, 1916, Meinel & Wemple, Inc., ceased all communications and relations with H. Mutzenbecher, Jr., as general agents for appellants (fol. 266). There is some testimony in the record as to the receipt of communications by Clausen for other companies in the pool (as at fol. 275) but not a word tending to connect appellant with Clausen in any way (fol. 330).

The Mutzenbecher firm at Hamburg was also general agent for the Salamandra Insurance Company of Petrograd, Russia, and for the Paternelle Insurance Company of Paris, France, for whom Meinel & Wemple, Inc., was also United States manager and attorney-in-fact. These two companies had also been admitted to do business in New York under the statutory provisions by the State for insurance companies incorporated by the laws of a country outside of the United States. The *Salamandra* and the *Paternelle* cases were tried with the instant case (fol. 129) with the result that a vast deal of the testimony appearing in the voluminous record now before the Court applies to the Salamandra and the Paternelle companies and not to the appellant Second Russian Insurance Company. This has been the

cause of some confusion. For instance, the Circuit Court of Appeals says in its opinion in the case (297 Fed. 404, 406):

> "In addition to Meinel & Wemple, Inc., they (H. Mutzenbecher, Jr.) were represented in New York by Mutzenbecher & Ballard. After the World War the latter firm changed its name to Sumner, Ballard & Company. Nearly all of the stock of this company was owned by H. Mutzenbecher, Jr., and four of its directors resided in Hamburg."

Sumner, Ballard & Company, successor of Mutzenbecher & Ballard, succeeded Meinel & Wemple as the United States managers and sub-agents for the *Paternelle Company*, and had no relations with appellant Second Russian Insurance Company or with Meinel & Wemple, Inc.

The Course of the United States Business Between October 29th, 1916, and the Date of the Seizure.

Following the passage of the Russian act of October 29th, 1916, and the notification of cancellation to Mutzenbecher, Jr., the reinsurance company sent Meinel & Wemple, Inc., from Petrograd, a new agency agreement, by which the latter was to become general agent in the place of Mutzenbecher, Jr., for the American business (fols. 152, 601, 606). This new contract did not reach Meinel & Wemple, Inc., until March, 1917 (fol. 175). No new treaties were ever made and the only business done was that received by Meinel & Wemple, Inc., from the direct writing

companies under their existing treaties with the reinsurance company appellant.

Under the new agreement, Meinel & Wemple, Inc., received the full commission of 3½% (less deductions not material here) of the gross premiums. It had before receiving the contract collected these commissions in full for six months subsequent to October 29th, 1916, and deposited them in *its general bank account* (fol. 360), but on its books opened a "suspense reserve account," on which was entered the difference between its former commission of ¾ of 1%, plus expenses, and the full commission of 3½%.

While this corporation had been acting as subagent from 1913 to October 29th, 1916, it had performed only the work incidental to the United States branch (fol. 213). It did not, however, and was not able to carry on the additional functions that had been performed by the general agents at Hamburg, to wit, the mapping and carding of the business, which is a necessary compiling of statistics to avoid the overloading of a fire reinsurance company in any given field and the necessary retrocession (or reinsurance of reinsured risks) of business where the results of mapping or carding give evidence of such overloading (fols. 213, 214, 686). Mutzenbecher, Jr., acted as a clearing house for the members of the American pool (fols. 831-833).

The gentlemen connected with Meinel & Wemple, Inc., were men of large experience in the fire reinsurance business with a full appreciation of the predicament of the foreign companies due to the war; the financial outlay necessary to enable the agency here to carry on the

portion of the work theretofore taken care of in Europe and the preparation therefor would have cost more than the total commissions would justify (fols. 360, 366). The mapping and carding records of the American business for the years 1913, 1914, 1915 and 1916 were in Germany and not available to Meinel & Wemple, Inc., or to the appellant, as they were in the possession of the Mutzenbechers in Hamburg (fol. 308). Meinel & Wemple, Inc., realized that without too great an outlay in the preparation of new maps and the creation of an organization to keep the mapping and carding up to date, they could not earn the full commission of general agents (fols. 308, 361-2). The course which they determined upon was one dictated by common sense, as well as a spirit of fairness. They did two things:

(1) Made inquiry of the reinsurance company as to how they should solve their problem (fol. 278); and

(2) pending receipt of instructions and the new contract entered on their books the "suspense reserve account" which was merely a book entry showing the difference between what they had earned as sub-agents and the usual commissions of the general agent for the work which Meinel & Wemple, Inc., had not done and was not able to do. The full 3½% commission was deducted by them and deposited in their general bank account (fol. 360). The "suspense reserve account" was set up on their books as a record of an amount subject to adjustment with the insurance company (fols. 360-365). It was the intention of Meinel & Wemple, Inc., to retain only such

money as it was entitled to (fol. 368), and when the suggestion came from the Alien Property Custodian that they might be reserving this money for the use of the Mutzenbechers, they withdrew the accumulated amount from their bank account, on July 26th, 1918, and deposited it with the New York Life Insurance & Trust Company, the statutory trustee of the reinsurance company (fol. 294), where it was subsequently seized by the Alien Property Custodian.

In placing this amount to the credit of the reinsurance company, Meinel & Wemple, Inc., stipulated that it should be released from the "extra services" the non-performance of which had given rise to their creation of the "suspense reserve account" (fol. 302), a stipulation to which the reinsurance company agreed (fol. 371).

As bearing on the good faith of the officers of Meinel & Wemple, Inc., see quotation, page 16, *post*. Furthermore, with reference to the acceptance by Meinel & Wemple, Inc., of the general agency for the *Salamandra* Insurance Company in place of H. Mutzenbecher, Jr., the District Judge said (fol. 2741):

> "I do not believe (from the mien and bearing of the surviving corporation officers) that such signature would have been given, without consulting Mutzenbecher, and I personally respect them in entertaining that belief."

The trial Court had in mind the death of Mr. Meinel and referred to the remaining officers.

From the establishment of the United States branch of the reinsurance company, until January

1st, 1915, Meinel & Wemple, Inc., collected premiums, made the reserve deposits in New York and remitted full commissions with a statement of their expenses to the general agents at Hamburg. The latter, after checking the accounts, remitted the sub-agents their expenses, plus ¾ of 1% commission (fols. 202, 235, 356-358). After January 1st, 1915, no remittances were made by Meinel & Wemple, Inc., until January 1st, 1916, between which latter date and October 29th, 1916, Meinel & Wemple, Inc., deducted their expenses, plus commission of ¾ of 1% and remitted the balance of the 2½% (by agreement, not 3½% as formerly) commission to Mutzenbecher, Jr. (fol. 358), by radiogram. The balance of the premiums not required to be deposited in New York were remitted direct to the reinsurance company in Petrograd after the war commenced.

The last remittance to Mutzenbecher, Jr., was November 22, 1916, covering the October premiums (fol. 271). There was no remittance to Mutzenbecher Jr., on premiums collected between November 1st, 1916, and the entry of the United States into the war, in April, 1917, or thereafter (fol. 359).

No bordereaux or data were furnished Mutzenbecher, Jr., subsequent to the ukase of October 29, 1916 (fols. 2692-2699), and the business of Mutzenbecher was completely demoralized by the war which drafted its clerks and some of its members (fol. 2702).

The contract from the reinsurance company to Meinel & Wemple, Inc., making them general agents, was received by the latter in March, 1917 (fols. 175, 2600, 2680, 2681).

Mutzenbecher's title, which the lower Courts have held was vested in the United States, is assumed to have arisen as follows:

Further performance of the general agency contract between the reinsurance company and the Mutzenbecher firm became illegal under the laws both of Russia and of Germany (fols. 2393, 569) as well as impossible because of the state of war. The Russian statute of 1916 cancelled the agency contract (fol. 2394) and the reinsurance company was "forbidden to enter into any agreement or any commercial connections whatever with subjects * * * of enemy countries" (see Addendum B). The claim now is that the parties then entered into an agreement to act in defiance of the law of their respective countries, law which was common to them as belligerents. The Court of Appeal says:

> "the Russian ukase was met" by an agreement between the parties for Meinel & Wemple, Inc., to act under "a colorable agency contract * * * arranging for H. Mutzenbecher, Jr., to continue their work and being paid out of the commissions allowed to Meinel & Wemple, Inc., under the colorable agency contract."

The claim now attributed to the Mutzenbechers, but repudiated by them at the trial, in plain language, is that an agreement was entered into involving treachery by each party to his government and that under this bargain a cause of action arose in favor of the German national enforcible in our courts and to which our government has succeeded.

The claim also involves, subsequent to the entry of the United States into the war and the passage of our Trading With the Enemy Act, disloyalty on the part of Meinel & Wemple, Inc., a theory repudiated by everybody connected with the case.

We refer to the decision of the District Court in the action of *Salamandra Insurance Company* v. *New York Life Insurance & Trust Company* (the New York statutory trustee of both the Salamandra and Second Russian Insurance Companies, the Salamandra Company being one of the Mutzenbecher "pooled" companies) reported in 254 Fed. Rep. at pages 852-856, where the Court says:

> "It appears that in June, 1918, the Custodian, through one of his agents, began an investigation of the office of Meinel & Wemple, Inc., for the purpose of ascertaining if said corporation held any enemy owned funds or property. Upon the completion of the inquiry it was suggested that the fund of $115,013.19 had been set aside for H. Mutzenbecher, Jr., and that there was a secret agreement or understanding whereby this fund would be turned over to Mutzenbecher, Jr., at the end of the war.
>
> "Upon the expression of such conclusion, Meinel & Wemple, Inc., placed at the disposal of the Custodian all of its books and papers and the statements of its managing officers and said corporation also notified the Custodian that it felt it its duty to the complainant to return the fund in question into the account held by the defendant under the trust agreement hereinbefore referred to.

> "No answer being received to this communication addressed to the Custodian, Meinel & Wemple, Inc., did deposit the fund with the defendant (New York Life Insurance & Trust Company) pursuant to the permissive terms of said trust agreement."

The Court, after deciding that under the Trading With the Enemy Act the determination of the Alien Property Custodian, made in good faith, entitles him to the possession of alleged enemy property, and that such possession will not be interfered with by injunction, said:

> "It is only fair to Messrs. Wilcox, Meinel and Wemple, who are the managing officers of Meinel & Wemple, Inc., to say that the conclusion which I shall reach must in no wise be taken as a reflection upon the integrity, the loyalty, and honor of these men, or any of them. There is absolutely nothing before me which will serve to impeach their character even remotely; indeed, from the affidavits on file, the conclusion is inevitable that they are men of high probity and unquestioned loyalty and devotion to this government and the position they have assumed is altogether consistent with such conclusion" (S. C. 254 Fed. 852-856).

The evidence at the trial repudiated the theory of a colorable agency contract now relied upon by the Government. Carl Stahl, a member of the German firm, testified that there was *no secret agreement or understanding* between appellant and Mutzenbecher, Jr.; that such rights as the latter might have had were based upon the pre-war agency contract (fols. 2676, 2677).

Stahl did not know of the new agency contract between Meinel & Wemple, Inc., and appellant, his information extending only to the agreement between them and another company (fol. 2649); and Mutzenbecher, Jr., specifically repudiated the cancellation of the Second Russian agency upon receipt of notice from the insurance company through the Spanish legation and denied the effect claimed by it for the Russian statute (fol. 2600).

Carl Stahl (one of the Mutzenbecher partners) testified that on account of the war it was impossible, for a number of reasons, for Mutzenbecher, Jr., to perform its part of the agency contract (fols. 2702-2703, 2694-2695, 2699). Defendants' law expert, Dr. Grossman, testified that German edicts forbade the payment of money to nationals of belligerent countries (fol. 569).

The witness Stahl stated positively that if Mutzenbecher, Jr., had any interest whatever in the money seized by the Alien Property Custodian, it was based on the ineffectiveness of the war and the Russian Trading With the Enemy Act, to terminate the rights of Mutzenbecher, Jr., under the pre-war contract (fol. 2676).

The questions raised by the appeal are:

(1) Did "the Russian ukase of October 29th, 1916, as a matter of law, terminate the contract and, therefore, the right of H. Mutzenbecher, Jr., to commissions under its contract with the (reinsurance company) appellant" (S. C. 297 Fed. 404, 408); and

(2) If the Russian ukase of October 29th,

1916, as a matter of law, terminated the contract, could the appellant and Mutzenbecher, Jr., make, in the United States or elsewhere, a contract under which Mutzenbecher, Jr., would have a lawful claim to commissions that could, as such, be seized by the Alien Property Custodian?

(3) Was the contract between the New York corporation, Meinel & Wemple, Inc., and H. Mutzenbecher, Jr., voided by the war between the United States and Germany and the war legislation of the United States? (S. C. 297 Fed. 404, 410).

The syllabus preceding the opinion of the Circuit Court of Appeals (297 Fed. Rep. 404) does not correctly digest the opinion of the Court. The argument of appellant was, as the opinion shows:

(a) That the Russian war-time legislation of October 29th, 1916, cancelled and prevented further performance under the general agency agreement between the Russian reinsurance company and Mutzenbecher, Jr., the German co-partnership at Hamburg, Germany; and

(b) That irrespective of the said Russian decree the entry of the United States into the same war and its Trading With the Enemy Act prohibited further relations between the German co-partnership Mutzenbecher, Jr., and the New York corporation, Meinel & Wemple, Inc.

Errors Assigned.

Appellant states that the decree of the Circuit Court of Appeals is alleged to be erroneous in holding:

1. That the Russian ukase of October 29th, 1916, did not terminate the agency contract theretofore existing between it and defendant appellee, Mutzenbecher, Jr.

2. That to give effect to the Russian uakse would be a refusal to follow the policies and principles of the legislative and judicial departments of our Government.

3. That to give the Russian ukase the effect of terminating the agency contract would not accord with the principles of our legislative and public policy.

4. That it would be contrary to the principles of comity to recognize the Russian ukase as terminating the contract.

5. That it was necessary to give extraterritorial effect to the Russian ukase cancelling the general agency contract between appellant and appellee, Mutzenbecher, Jr.

6. That the Russian ukase had no extraterritorial effect and did not operate as a cancellation of the agency contract between appellant and appellee Mutzenbecher, Jr.

7. In failing to find that all contractual rela-

tions between appellee, Mutzenbecher, Jr., and appellant were cancelled and annulled on or prior to October 31st, 1916.

8. In ignoring the principles of the law of nations by failing to give to said Russian ukase full faith and credence under the principles of national comity.

9. That notwithstanding the Russian ukase and the state of war then existing between the Russian and the German Empires, appellant entered into an agreement with a New York corporation with the intention of carrying on its former business with appellee, Mutzenbecher, Jr., under the terms of the former contract between them, cloaked and covered by an agreement with the New York corporation, for the purpose of evading the Russian ukase.

10. In holding that the agreement of October, 1916-March, 1917, between appellant and Meinel & Wemple, Inc., was void.

11. In refusing to give effect to the contract dated October 31st, 1916, between appellant and Meinel & Wemple, Inc.

12. In finding that Meinel & Wemple, Inc., were acting as agents for appellee, Mutzenbecher, Jr., in handling the United States business of appellant, subsequent to October 31st, 1916.

13. That the agency contract existing between appellee, Mutzenbecher, Jr. (a German national of Hamburg, Germany) and Meinel & Wemple,

Inc. (a New York corporation), was not voided by the war between the United States and Germany.

14. In not holding that the agency agreement between Meinel & Wemple, Inc., and appellee, Mutzenbecher, Jr., was voided by the passage of the Act of Congress of the United States, known as the Trading With the Enemy Act.

15. That the money seized by the Custodian from defendant, the New York Life Insurance & Trust Company, was the property of appellee, Mutzenbecher, Jr., and subject to seizure under the Trading With the Enemy Act.

16. That appellee, Mutzenbecher, Jr., was a creditor of appellant at the time of the seizure.

17. That appellee, Mutzenbecher, Jr. (a), had rendered services to appellant after October 29th, 1916; and (b) was entitled to compensation after that date by reason of the contract theretofore existing between it and appellant.

18. In reaching the decision upon which it based the decree appealed from, by interpreting as applying to appellant and so applying testimony which was pertinent only to the Salamandra Insurance Company and the Paternelle Insurance Company, respectively.

19. In disregarding the terms and provisions of the New York Insurance Law, Section 27, under which the defendant, New York Life Insurance & Trust Company, held the money seized.

POINTS.

FIRST.

Further performance of the agency contract between the Russian Corporation and the German partnership became impossible and illegal after October 29th, 1916, and both parties were excused therefrom.

The general rule of international law, common to all nations, is that commercial intercourse of every kind is forbidden between nationals of belligerent powers. *Watts, Watts & Co., Ltd.*, v. *Unione Austriaca Di Navigazione*, 224 Fed. 188; 229 Fed. 136; 248 U. S. 9; *Joring* v. *Harriss*, 292 Fed. 974.

The Russian insurance company was permitted, by special license of the Russian Government, to continue performance of the contract after the outbreak of war with Germany, in August, 1914, and until October 29th, 1916 (fols. 746-7). It continued to carry out the agreement until prohibited by its Government from continuing "existing contracts with enemy firms" (Addendum B, *post*). Further performance then became illegal and impossible, because absolutely interdicted by the laws of the countries of both contracting parties. In this situation, such being the law common to the belligerents and to the neutral forum, no action could have been brought here by the Mutzenbechers during the war (*Watts* case, *supra; Joring* v. *Harriss*, *supra*).

The lower Courts have ignored the Russian Act of October 29th, 1916, concededly of full force in Russia, saying it

> "can have no force or effect in the United States, unless our Courts, in applying the principle of comity of nations, give it such effect" (S. C. 297 Fed. 404, 409).

The Circuit Court of Appeals has thus stated the general rule as to the operation of foreign law on the *res* in the jurisdiction asked to apply it (*Barth* v. *Backus*, 140 N. Y. 230), or on the rights of citizens or persons under the protection of the laws of the forum.

But the Russian insurance company, appellant, never had birth or legal *sanction to exist* in this country at all. As a corporation, it never was here. It was created by the Russian Government, derived it existence and powers solely from that Government and could not change its domicile. It was permitted to transact business here, through an agent. Its legal death at the domicile would destroy that agency (except where coupled with an interest). As said by this Court, it could

> "make no contracts and do no acts, either within or without the state which created it, except such as are authorized by the law of its creation." *Bank of Augusta* v. *Earle* (13 Pet. 520, 584).

Inasmuch as the Russian Trading with the Enemy Act regulates the *power* of the corporation, that law had the same effect, wherever the corporation was permitted to do business through agents, as to the *power* of its agents, even as

had the statute under which the corporation was created and which was a part of its charter and the law of its existence. *Relfe* v. *Rundle* (103 U. S. 222); *Michigan Bank* v. *Gardner* (15 Gray, 362). The foreign jurisdiction may not enlarge the powers granted the corporation or its agents by the law of its birth. The law of the forum could not authorize a foreign corporation (or its agents) chartered to do fire insurance business to do a life insurance business; no more may it authorize such foreign corporation to make any other contract not authorized by the law of its existence.

The existence and the *powers* of any corporation going into a foreign jurisdiction to do business are at all times subject to the laws, present and future, of its creation and of its domicile; and, in addition, to the laws of the foreign jurisdiction relating to it (not enlarging its corporate powers) and the terms laid down by the foreign jurisdiction as the condition of allowing it to transact business in that jurisdiction. *Bank of Augusta* v. *Earle* (13 Pet. 519, 599, 589); *Demarest* v. *Flack* (128 N. Y. 205); *Hoyt* v. *Thompson Executor* (19 N. Y. 207); *Sinnott* v. *Hanan* (214 N. Y. 454, 458); *Martyne* v. *American Union Insurance Co.* (216 N. Y. 183, 196).

The provisions of the Russian Act of 1916 in no wise affected any right of any citizen within the United States or of any person within the protection of its laws. It was a part of the legislation of Russia for the protection of that nation's existence in a state of war with Germany, and

should be given effect in the United States. *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corp., et al.* (Opinion by this Court, Jan. 26, 1925).

As was said in the great case of *Canada Southern Railway Co.* v. *Gebhard* (109 U. S. 527):

> "A corporation of one country doing business in another country is subject to such control in respect to its powers and obligations as the government which created it may properly exercise. Every person who deals with it anywhere impliedly subjects himself to such laws of its own country affecting its power and obligations as the known and established policy of that government authorizes. Anything done in that country under the authority of such law which discharges it from liability there, discharges it everywhere."

The statement in the opinion of the Circuit Court of Appeals (S. C. 297 Fed. 404, 409):

> "To give effect to the Russian ukase cancelling and terminating the contract in question would be the refusal of our courts to follow the policies and principles of our legislative and judicial departments of government. The purpose of the (United States) Trading With the Enemy Act, with the creation of the Alien Property Custodian, was to seize such alien enemy owned property as is involved here."

is meaningless, if the effect of the Russian statute was as we have stated. If that statute was effective, there was no alien enemy owned property thereafter created to be seized. (*Direction, etc.* v. *U. S. Steel Corp., supra.*)

The policy of the legislative department of our Government in enacting the Trading With the Enemy Act was not for conquest; but to seize enemy owned property in this country and prevent the use, comfort and enjoyment of it to the enemy. There was no authority in the Act for the Alien Property Custodian to seize property which did not belong to an enemy and which the enemy itself could not have reduced to possession (*Stoehr* v. *Miller, Alien Property Custodian*, 296 Fed. 414); nor to hold the same against a lawful claim (*Miller, Alien Property Custodian* v. *Kaliwerke, etc.*, 283 Fed. 746).

SECOND.

Assuming, for this argument, that appellant and Mutzenbecher, Jr., did agree to continue the agency contract and make payments, in violation of the laws of Russia and of Germany, common to the law of the forum, such agreement remained executory; no action, legal or equitable, was maintainable thereon, and the funds seized were not subject to any claim in favor of Mutzenbecher, Jr.

The seizure was made by the Custodian as of title to a debt due from the reinsurance company to Mutzenbecher, Jr., vested in the United States by virtue of their Trading With the Enemy Act (fol. 50). Such property, so seized, vests *absolutely* in the Government and is not held as trustee for the alien. (*Munich Insurance Company* v. *First R. Insurance Company of Hartford*, 300 Fed. 345.) Nevertheless, the Mutzenbecher firm

was permitted to file an answer (fols. 64-99) and has been the most active defendant, making claim to the money seized, as stated by the Court of Appeals, on the ground

> "that the agency transfer (the appointment of Meinel & Wemple, Inc., in place of Mutzenbecher, Jr.) was not *bona fide*, but was taken to avoid steps which had been taken by Russia to put an end to commercial intercourse between subjects and citizens of that country and subjects and citizens of Germany" (S. C. 297 Fed. 404, 406).

It is further stated in the opinion of the Circuit Court of Appeals that the Russian Trading With the Enemy Act of October 29th, 1916,

> "was met by Meinel & Wemple, Inc., with full authority as agents arranging for Mutzenbecher, Jr., to continue their work, and being paid out of the commissions allowed to Meinel & Wemple, Inc., under the colorable agency contract." * * * "We are satisfied that the parties intended to carry on the former business with H. Mutzenbecher, Jr., under the terms of the original contract, cloaked or covered by sub-agency for the purpose of avoiding the Russian ukase" (S. C. 297 Fed. 404, 408).

The contract thus assumed was void because it involved a violation of law.

The Russian statute provided that those who infringe the decree

> "are subject to imprisonment during a period of two months to one year and four months, and besides to the payment of a

> fine of from one thousand rubles to twenty-five thousand rubles" (Addendum B, p. 43).

In *United States* v. *Lapene,* 17 Wall. 601, 84 U. S. 601, the Court, in holding that an agency legal when created was terminated by the hostile position of the parties, said:

> "All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one in person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion. No property passes and no rights are acquired under such contracts."

See, also:

> *Hanauer* v. *Doane,* 12 Wall. 342;
> *Davidson* v. *Lanier,* 4 Wall. 447;
> *Brown* v. *Tarrington,* 3 Wall. 377.

The continuance of the relation between appellant and Mutzenbecher, Jr., was permitted by the Russian Government until October 29th, 1916, on which date the permission was withdrawn and thereafter under the foregoing decisions the continuance of the relation was, by the very fact of the hostile position of the parties unsupported by express governmental license, completely terminated for all parties without regard to the effect of the statute outside of Russia.

The Russian statute forbade Russian subjects

> "to enter into any agreement or any commercial connections whatever with subjects,

> associations and companies of the enemy countries," * * * and cancelled "all existing relations by virtue of contracts with enemy firms" (Addendum B, p. 43).

The Russian statute was in the nature of a mandatory injunction on the powers of the Russian corporation. The existing contract between the parties was terminated thereby and the further performance or making of a new contract enjoined. *People* v. *Globe Mutual Life Insurance Company* (91 N. Y. 174).

We advert to the fact that a great portion of the record refers to the cases of *Salamandra* and *Paternelle Insurance Companies* (tried with the instant case, but not appealed) and has no application to the case of appellant, Second Russian Insurance Company.

The situation as to these companies differs. Appellant had, prior to the war, cancelled all of its contracts with Mutzenbecher, Jr., except that for the American business. After the promulgation of the Russian decree Meinel & Wemple, Inc., received a cable from Mutzenbecher, Jr., two months before the former had received the new contract of Second Russian Insurance Company (about which Mutzenbecher, Jr., knew nothing at any time, fol. 2649) and before the latter had received notice of cancellation of the Second Russian Insurance Company contract (fol. 2680), saying:

> "You may sign the contract which your company (Salamandra) will present to you" (fols. 252, 2664).

Mutzenbecher, Jr., had waived any right which it might have to commissions under the *Salamandra* contract after the notice of cancellation thereof by letter dated November, 1916, in accordance with the ukase of October 29th, 1916, basing its waiver upon its inability to further perform any of the services contemplated by the said contract (fols. 2702-3, 2694-5, 2699, 2800, 2808).

Defendants' witness Stahl, one of the Mutzenbecher partners, denied all knowledge of the appointment of Meinel & Wemple, Inc., as general agent for appellant. He knew only of the new contract between Meinel & Wemple, Inc., and the *Salamandra* Company (fol. 2649).

The reason for the waiver in case of the Salamandra (fols. 2674-5; Plaintiff's Ex. 7, fol. 2800) while claim was made against the Second Russian is explained by the testimony of defendants' witness Stahl. Mutzenbecher, Jr. had been advised by the agent and also by the attorney of the Alien Property Custodian after the Salamandra waiver, that if the Custodian could succeed in holding money seized from appellant's trustee, Mutzenbecher, Jr., "could have some hope of getting it" (fols. 2669-2670).

The claim of the Mutzenbechers has consistently been most positive that if they had any interest whatever in the seized money it was not based upon the new contract but on the ineffectiveness of the war and the Russian ukase to terminate their rights under the pre-war contract (fol. 2676). They knew nothing about the new contract with the Second Russian (fols. 2649, 2689-90). When they received, on March 14th, 1917, notice of cancellation through the Spanish Em-

bassy (fols. 2600, 2680), they immediately repudiated the idea that the old agreement was cancelled by that statute (fol. 2681). They considered the old contract in force (fol. 2624) under the advice of their lawyer (fols. 2629, 2667-8, 2677). The only new contract they knew about was that between Meinel & Wemple, Inc., and the Salamandra Company (fols. 2649, 2689, 2664, 2666).

These are the facts. Assuming, however, for argument:

(1) That appellant had a secret agreement with H. Mutzenbecher, Jr. Under the decisions, that agreement would be illegal and void, and no rights thereby vested in either party.

(2) That there was a secret and undisclosed intention on the part of the appellant to donate the fund in question to H. Mutzenbecher, Jr. If there is such a thing as an unexecuted gift, it conveys no rights whatever.

(3) That the officers of Meinel & Wemple, Inc., had the intention in the creation of the "suspense reserve account" to conserve the balance shown therein until such time as they might donate the same to H. Mutzenbecher, Jr.; that in doing so they acted under instructions from appellant, or that they acted without its knowledge and consent.

In the latter case, appellant could in no wise have been bound by the undisclosed intention of Meinel & Wemple, Inc., or by anything the latter might have done in furtherance thereof.

In either case, moreover, the fact remains that Meinel & Wemple, Inc., did not transfer the fund to H. Mutzenbecher, Jr., but did transfer the same to appellant either in satisfaction of a legal obligation or as an executed gift. Whether it was a gift or a transfer for consideration, it was executed and vested all rights to the fund, upon acceptance, in the appellant (*Stoehr* v. *Miller, Alien Property Custodian, supra*). If a gift to H. Mutzenbecher, Jr., had been contemplated (a transfer could, under the admissions of H. Mutzenbecher, Jr., have been nothing but a gift), it was never executed and, therefore, no right to the fund ever vested in H. Mutzenbecher, Jr. Meinel & Wemple, Inc., had no difficulty in transmitting funds to H. Mutzenbecher, Jr., during the existence of but prior to our entrance into the War, and had ample opportunity to transfer to H. Mutzenbecher, Jr., the accrued commissions if, acting either under instructions or on their own initiative, they had had any such intention. This assumption, then, like all the rest, is wholly untenable in the light of the undisputed facts.

It is denied by both Mutzenbecher, Jr., and the appellant, that a new contract was entered into between them after the ukase of October 29th, 1916, and there is no evidence in the record in contradiction.

The purpose of Meinel & Wemple, Inc., in setting up on their book the "suspense reserve account" is obvious in the light of all the circumstances. But assuming, for the sake of argument (as the Alien Property Custodian assumed), that it was with the *intention* of later delivering the

amount stated to Mutzenbecher, Jr., no title, legal or equitable, passed, whether the delivery was to be made as a gift or under an *executory* contract.

It need not be determined whether the seizure could have been sustained even had the money been found *in the possession of Mutzenbecher, Jr.*, in view of the unlawful nature of the contract under which it would have arisen. It is certain that no fiction of law as to implied contracts may be invoked in aid of title under an *executory* contract which existed, if at all, in contravention of the laws of the domicile of both the contracting parties, common to the forum.

Mutzenbecher, Jr., could have maintained no suit in our courts to recover the commissions, whether alleged to have accrued under the old contract or under the new, so long as Russia and Germany were at war (*Watts, Watts & Co., Ltd.* v. *Unione Austriaca, supra*; *Joring* v. *Harriss, supra*). It is clear that our Alien Property Custodian was empowered to seize only property possessed by, or reducible to possession by alien enemies except for disabilities growing out of *our* participation in the war.

It would indeed be an anomalous situation if the custodian under our own Trading With the Enemy Act could enlarge upon the rights of the alien enemy in order to sustain his right to seizure. That in effect is what the lower Courts have permitted in this case.

The monies in question were withheld and were being withheld from Mutzenbecher, Jr., by reason of the provisions of the Trading With the Enemy Act of a friendly power and by reason of the pro-

visions of our own Trading With the Enemy Act. Yet because of the Custodian's construction of the *intention* of the appellant or its agent to deliver the money to Mutzenbecher, Jr., when the Russian Trading With the Enemy Act (Oct., 1916-April, 1917) and later (after our entry into the War) our Trading With the Enemy Act, no longer forbade—an *intention* which Mutzenbecher, Jr., could not at any time enforce—the Courts below permitted the Custodian to sustain his seizure.

It is respectfully submitted that the right of the Custodian to seize funds as due under any fancied executory contract of Mutzenbecher, Jr., is only such right as Mutzenbecher, Jr., might have exercised and that under the circumstances disclosed neither Mutzenbecher, Jr., nor the Custodian had any rights in and to the monies seized.

The equities of the case at bar are clear. The appellant paid H. Mutzenbecher, Jr., during a period of more than two years when it was impossible for that firm to render any of the services contemplated by the contract. To take further money from appellant for the benefit of H. Mutzenbecher, Jr., or for the benefit of the United States, as for commissions subsequent to the termination of the contract, would be unjust.

Conclusions.

1. The Russian ukase of October 29th, 1916, cancelled the contract theretofore existing between appellant and Mutzenbecher, Jr., and nullified the right of the latter to further commissions.

2. After the declaration of war by the United

States against Germany, the right of Mutzenbecher, Jr., to continuing commissions would have terminated even if not previously nullified by the Russian ukase of October 29th, 1916.

3. The United States Trading with the Enemy Act would have voided the right of Mutzenbecher, Jr., to continuing commissions even if not previously terminated by the declaration of war by the United States against Germany.

4. The Russian ukase of October 29th, 1916, nullified the right of Mutzenbecher, Jr., to further commissions, not by extraterritorial operation, but as a law of the domicile of appellant corporation, limiting the powers of the corporation at its domicile and everywhere else.

5. The Russian ukase of October 29th, 1916, will be given extraterritorial force in the United States as the law of a friendly power, not affecting our citizens, in all respects in accord with our legislative and judicial policy and in all essential particulars, similar to our own trading with the enemy policy and legislative acts under which the Custodian seeks to sustain his seizure of the funds in question.

6. The purpose of the Russian ukase of October 29th, 1916, was to prevent financial aid to the enemy, a purpose which must be given effect by all friendly, neutral or allied powers.

7. If Mutzenbecher's right to commissions continued either under the old contract or under a contract entered into after October 29th, 1916,

the right to seize such commissions not actually in the possession of an enemy in and of the United States was a right which belonged only to the country of the domicile of the corporation creditor, which alone could declare such commissions forfeit to the government; and the denial of that right in the United States by seizure from the hands of the corporation or its agent, would be an act unfriendly to the government of the corporation's domicile.

8. If the funds in question had been found in the hands of Mutzenbecher, Jr., the seizure would have been valid; but so long as they remained in the hands of appellant or its agent, or the statutory trustee under the New York insurance law, they had been divested of their color of enemy title by the effective operation of the Trading With the Enemy Act of a friendly power, whose right to treat them as enemy property had been effectively exercised prior to the time when our own right attached.

9. Either the right of Mutzenbecher, Jr., to continue receiving commissions had been terminated by the Russian ukase of October 29, 1916, or else that right could not be terminated by the laws of the United States or any other country.

10. No right to the funds in litigation, legal or equitable, could, after October 29th, 1916, vest in Mutzenbecher, Jr., either under the original contract or by virtue of any contract entered into subsequent to the ukase of October 29th, 1916.

11. The right of the Alien Property Custodian is only that of Mutzenbecher, Jr.

12. The seizure of the funds in question by the Alien Property Custodian was without right.

THIRD.

The decrees appealed from should be reversed.

Dated, New York, February 16th, 1925.
1925.

Respectfully submitted,

ALBERT MASSEY,
Counsel for Complainant-Appellant,
No. 36 West 44th Street,
New York, N. Y.

Addendum A.

Section 27, New York Insurance Law.

Section 27. FUNDS AND CAPITAL WITHIN THE UNITED STATES OF CORPORATIONS ORGANIZED OUTSIDE OF THE UNITED STATES, TRANSACTING IN THIS STATE THE BUSINESS OF FIRE OR MARINE INSURANCE. 1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance, four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insur-

ance departments or state officers or so held in trust.

2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. In addition to the reports required by law of such a foreign insurance corporation, it shall, not later than the fifteenth day of February in each year, file in the office of the superintendent of insurance a detailed statement, as of the thirty-first day of December next preceding, of the items making up such securities and other property so deposited and held in trust by a trustee or trustees and of the deductions to be made therefrom, signed and verified by the United States manager or attorney of such corporation, the items of the securities and other property held under trust deeds to be certified to by the trustee or trustees; provided that the superintendent may

also at any time require a further statement of the same kind and of such date as he may determine. The superintendent of insurance shall, on the filing of such annual statement, or from such examination as he may make of the affairs of such corporation, determine the amount of such capital as of the thirty-first day of December next preceding, and issue to such corporation his certificate of the amount of its capital as so determined; and, if it shall at any time appear that the capital for which the last certificate shall be outstanding has been materially reduced, the superintendent shall issue to such corporation a new certificate stating the amount of such reduced capital; provided that the capital so ascertained is not reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance.

3. Whenever it appears to the superintendent, from any statement made to him, or from an examination made by him or by an examiner appointed by him, that the capital of such a foreign insurance corporation is reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or of four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance, or that its assets are insufficient to justify its continuance in business, he shall determine the amount of such impairment or deficiency and

issue a written requisition to such corporation, through its United States manager or attorney, to make good the amount of such impairment or deficiency within such period as he may designate, not less than thirty nor more than ninety days from the service of the requisition.

4. That part of the capital of such a foreign insurance corporation required to be deposited with insurance departments or state officers shall be invested and kept invested as is required by the laws of the states where such deposits are made with regard to deposits by insurance corporations organized under the laws of a foreign country. The funds of such a foreign insurance corporation, other than its deposits, may be invested in such securities or other property as may be acquired and held by a domestic insurance corporation transacting the same kind or kinds of business.

5. When any part of the securities* or other property of such a foreign insurance corporation is held by a trustee or trustees, such trustee or trustees shall be appointed by the board of managers or directors of such corporation, and a duly certified copy of the vote or resolution creating the trust shall, with a duplicate original of the deed of trust, approved by the superintendent of insurance, be filed in the office of such superintendent. The trustees or trustee shall be either three or more citizens of the United States or a trust company authorized to execute trusts in a state where such corporation has applied for

*So in original.

authority or been authorized to do business, and must be approved by the superintendent of insurance. Such superintendent may examine such trustee or trustees, and the securities or property of such trust, and any books or papers affecting the same, in the same manner as he is authorized by this chapter to examine the affairs or funds of a domestic insurance corporation.

6. The superintendent of insurance may also receive for deposit from such a foreign insurance corporation securities or property in addition to the minimum deposit required by subdivision one of this section; but no such additional deposit now held by him or hereafter made with him shall be surrendered to such foreign insurance corporation unless the corporation's deposit with the superintendent of insurance after such surrender shall, at then market values, be at least equal to the deposit required to be made with him by subdivision one hereof. In case the deposit requirement of any state in which such foreign corporation shall at the time be transacting business is greater than the minimum deposit herein provided, the additional deposit shall not be surrendered except upon the written consent of the insurance supervising official of such state.

7. Such a foreign insurance corporation now or hereafter authorized to transact the business of fire insurance in this state may also be authorized to transact the business of marine insurance when and in case it has complied with subdivision one of this section. Such a foreign insur-

ance corporation now or hereafter authorized to transact the business of marine insurance in this state may also be authorized to transact the business of fire insurance when and in case it has complied with subdivision one of this section. Separate statements of the fire and marine business transacted by such foreign insurance corporation shall no longer be required or permitted.

Addendum B.

For the convenience of the Court we attach an English Translation of Russian Decree of October 29th, 1916.

TRANSLATED FROM RUSSIAN.

Extract from the COLLECTION OF DECREES AND ENACTMENTS OF THE GOVERNMENT edited by the Governing Senate.

October 29th, 1916, No. 302 CHAPTER FIRST.

Article 2382 Re interdiction of trade with enemy and certain neutral firms.

By decision of the Cabinet Council ratified by His Imperial Majesty under date of October 24th, 1916, it has been decreed that:

By virtue of Article 87 of Constitutional Laws of the Empire (Code of Laws, Vol. 1, part 1, edit. 1906), the following be decreed:

(1) Hereafter and until further enactment, all Russian subjects and any person, in general, re-

siding within the boundaries of the Russian Empire, as well as all trade and industry associations and joint stock companies established in Russia, are forbidden to enter into any agreement or any commercial connections whatever with subjects, associations and companies of enemy countries, as well as with any individuals, associations and companies of other foreign countries mentioned on special lists published to this effect. All existing relations by virtue of contracts with enemy firms must be considered as stopped from the date of promulgation of the present decree and with neutral firms—on expiration of one month's delay from the date of publication of said lists.

(2) The lists mentioned in the preceding article (1) are revised and confirmed by the Cabinet Council after being submitted to this Council by the Minister of Commerce and Industry and upon the previous agreement of the latter with the Home Department regarding insurance enterprises to be included in these lists, and with the Ministry of Finance regarding credit establishment. Duly confirmed lists are published in the Collection of Decrees and Enactments of the Government and in periodicals, in accordance with instruction of the Minister of Commerce and Industry.

(3) Those who would infringe to the interdiction stated in Article 1 of the present decree are subject to imprisonment during a period of two months to one year and four months, and besides to the payment of a fine of from one thousand rubles to twenty-five thousand rubles.

No. 449—The Russian Consulate General at Paris certify by these presents that the above is a true copy of the original unto this Consulate produced

Paris February 24th 1923

The Consul General

(LS) (Signed): AITOF

Consular fee 4 rbls-10 frs.

above signature of Mr. Aitof to be genuine.
above signature of Mr. Atof to be genuine.

Paris, February 24th, 1923

For the Chief Clerk Delegate For the Minister

(LS) (Signed): Eymery

Account Agent of the Ministry of Foreign Affairs

February 24th, 1923
Received 8 Francs
Receipt No. 100

I, the undersigned, certify that the above is a true translation of the original unto me produced. No. 13775 *"Ne varietur"*

Paris, March 2nd, 1923.

(Signed) SMOLSKI.

Authentications follows.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924—NO. 362.

SECOND RUSSIAN INSURANCE COMPANY,
Appellant,

v.

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners, doing business under the firm name and style of "H. Mutzenbecher, Jr.,"

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JAMES A. BEHA, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS STATUTORY LIQUIDATOR OF SECOND RUSSIAN INSURANCE COMPANY, UNDER NEW YORK INSURANCE LAW, SECTION 63, SUB-DIVISIONS 4 AND 5.

ALBERT MASSEY,
Counsel for James A. Beha, Superintendent of Insurance of the State of New York, as statutory liquidator of appellant.

THE COURT PRESS—47 West Street—Bowling Green 2820 Law Printers

Supreme Court of the United States,

OCTOBER TERM—NO. 362.

SECOND RUSSIAN INSURANCE COMPANY,

Appellant,

—against—

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",

Appellees.

Brief for James A. Beha, Superintendent of Insurance of the State of New York, as Statutory Liquidator of Second Russian Insurance Company, Under New York Insurance Law (L. 1909, Ch. 33; Consol. Laws, Ch. 28, Sec. 63, Sub-divs. 4 and 5).

Statement.

Appeal from a decree of the Circuit Court of Appeals, Second Circuit (297 Fed. 404), affirming a decree of the District Court, Southern District of New York, dismissing the bill after a trial upon the merits.

The Facts.

The facts are stated in the brief heretofore filed and served on behalf of the appellant Second Russian Insurance Company and are not herein re-stated. Since the filing of the brief of appellant and the service on April 24th, 1925, of brief for Thomas W. Miller, as Alien Property Custodian, and Guy F. Allen, as Treasurer of the United States, the New York Supreme Court has, on April 24th, 1925, directed Hon. James A. Beha, as Superintendent of Insurance of the State of New York, to take possession, forthwith, of the property and conserve the assets of the Second Russian Insurance Company, pursuant to a petition duly presented on February 13th, 1925, to said Supreme Court by the Superintendent of Insurance, pursuant to the New York Insurance Law, Section 63, Sub-division 4.

Argument.

THE DECREES APPEALED FROM SHOULD BE REVERSED FOR THE REASONS STATED IN THE PRINTED ARGUMENT OF APPELLANT SECOND RUSSIAN INSURANCE COMPANY.

The Alien Property Custodian and the Treasurer of the United States by their joint brief filed herein and served April 24th, 1925, adopt the statement and argument of the special assistant to the Attorney General, as personal counsel for the defendants Mutzenbecher, Jr., to-wit: that "the right of the Alien Property Custodian to retain the funds seized, depends upon enemy owner-

ship, which, as presented by this case, is a question of fact and not of law."

The Superintendent of Insurance respectfully urges that the questions of fact attempted to be argued by the special assistant to the Attorney General as attorney for Mutzenbecher, Jr., are not presented by this appeal; that his argument disregards the question of law decisive of the case and duly presented by appellant, to-wit: the legal effect of the Russian statute of October 29th, 1916, cancelling and annulling the agency contract between the Russian corporation, appellant, and the German co-partnership, the respondents, Mutzenbecher, Jr. By decision of this question of law the facts argued by respondents become immaterial.

For the reasons stated in appellant's brief, the undersigned respectfully submits that the decrees appealed from should be reversed.

Dated, New York, N. Y., April 27th, 1925.

ALBERT MASSEY,
Counsel for James A. Beha, Superintendent of Insurance of the State of New York, as statutory liquidator of appellant.